No. 49178-8-II

THE COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

LENDIN SAITI,

Appellant.

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# BRIEF OF RESPONDENT

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## III. STATEMENT OF THE CASE

In July, 2015 Angela Patty Lopez and Lendin Saiti began chatting through Facebook, which quickly blossomed into a romantic relationship, and shortly thereafter they began living together in Lopez's home. RP 47-48, 106-07. Their relationship continued and on December 20, 2015 Lopez and Saiti were at their apartment, and Saiti was, again, asking for money from Lopez. RP 53. Lopez did not want to give Saiti more money because she feared he would use it to buy drugs, as he had in the past, and they argued over Lopez's decision not to give Saiti money for drugs. RP 63, 171. Without giving Saiti money, Lopez went to work at OleBob's Seafood Market and Restaurant to open for the day. RP 45, 64. Lopez took her purse with her. Inside her purse was her gun, the keys to her vehicle, $80.00, jewelry, and her paycheck. RP 64, 69. She placed her purse in an employee-only area of the restaurant, which is where she always placed her purse. *Id.*

Saiti entered the restaurant several times that morning asking for money. RP 65, 109. Lopez continued refuse giving Saiti money because she was concerned he would buy drugs with the money. *Id.* Saiti also asked to use Lopez's phone, but she refused and Saiti left frustrated. RP 66. As Saiti left, Lopez observed Saiti driving off in her

Toyota Camry. *Id.* Lopez did not give anyone, including Saiti, permission to take her vehicle on December 20, 2015. RP 74, 161, 176. Lopez was angry that Saiti had taken her car, and was clear that her car had been stolen and not merely borrowed. RP 244. Lopez immediately went back to the kitchen to see if her purse was gone. RP 66. Saiti had taken her purse along with the contents of her purse, including the keys to the vehicle and her pistol. RP 68, 114. Lopez asked her coworker, Amy Leback, to call the police. RP 69. Leback had observed Saiti leaving the restaurant very fast holding Lopez's purse and observed a frantic Lopez saying Saiti "stole my purse and my car." RP 110, 112. Lopez was frantic, upset, shaky, and on the verge of tears. RP 112.

Long Beach Police Officers and Deputies form the Pacific County Deputy Sheriff's Office began looking for Lopez's Toyota Camry. RP 94-96. Deputy Travis Ostgaard was the first to observe Saiti in the stolen Camry and in an attempt to stop the vehicle, which was going in the opposite direction, Deputy Ostgaard activated his emergency lights, but Saiti sped away and made the coroner before he could be stopped. RP 256, 260. Deputy Sam Schouten observed the stolen Camry and Saiti walking away from it towards a trailer where he would later be apprehended inside the trailer. RP 96-100.

Saiti appeared to be under the influence of heroin at the time of his arrest. RP 243. Saiti was searched incident to arrest and officers located two hypodermic needles and a container with heroin inside. RP 209-211. The keys to Lopez's vehicle were located in the trailer where Saiti was apprehended. RP 212. Once officers were able to enter the vehicle they took a picture of Lopez's purse which was on the passenger seat. RP 213-214, exhibits 6, 7, and 28. Clearly visible in the purse was an operable, loaded firearm. RP 216, 220. The cash which had been in the purse was missing. RP 217.

Saiti and Lopez were together when she purchased the firearm and Saiti observed Lopez put the firearm in her purse. RP 76-77, 170. The purse Saiti took was the same purse Saiti had observed Lopez put the gun into. RP 77, 170-71. This was the only place she ever kept her pistol. *Id.* This pistol that Saiti took was the same pistol Lopez kept in her purse and she owned no other firearms. RP 78, 81.

During the course of Lopez's direct examination, the Deputy Prosecutor, outside the presence of the jury, indicated to the Court that Lopez was not testifying as she had the prior day and the State was concerned she was heading down the road to committing perjury. RP 55. The trial court asked Lopez if she understood what

perjury was and she indicated she did not. RP 56. The trial court explained what perjury was and then confirmed Lopez understood her obligation to testify truthfully. RP 56-57. As a result, the Defense asserted they should be entitled to tell the jury that the court informed Lopez of her obligation to tell the truth. RP 58. The trial court informed Lopez that she was not being instructed "... if you don't change your tune and answer the questions the way the prosecutor wants you to, that it's perjury. That is not perjury. So all you need—you don't need to worry about a thing. Just tell the truth the best you know it." RP 59. The trial court further asked Lopez whether, "it is clear to the witness that this [c]ourt is not telling you to testify in any certain way except expects you to tell the truth the best you know the truth." RP 60. The trial court further asked Lopez, "you understand the [c]ourt is not telling you to agree with what the prosecutor might want you to say? In other words, you say what you know." *Id*. Lopez acknowledged she understood her obligation. *Id.*

The trial court also excluded the parties from raising the issue of the material witness warrant. RP 138-39. Defense asserted law enforcement contacted Lopez sometime in advance of trial and that made her feel threatened. *Id*. The state explained officers attempted to contact Lopez after repeated attempts were unsuccessful in order

to provide a basis for the later requested material witness warrant. *Id.* The trial court reserved and directed the Defense to raise the issue when appropriate. RP 140. The defense theory of the case was that Lopez felt pressured to testify because of the material witness warrant issuing. To counter, the state asked Lopez about her reporting the car stolen to the police and the document used to report the theft, which outlined no one had permission to use her vehicle. The defense asserted, pursuant to ER 403, Lopez felt "some kind of pressure to be here. She has—you know, did request that charges be dropped in this case. They were not. We believe this was relevant to show her bias or prejudice or bias in this case as to her credibility as a witness in the State's case in chief." RP 181-82, 184. The defense asserted Lopez feeling pressured and her desire to drop the charges demonstrated a lack of credibility of the witness. RP 185. In overruling, the trial court noted he had heard nothing from the witness that she felt pressure to testify in the way that she testified and there was no nexus between the arrest on the material witness warrant and whether that influenced her testimony. RP 186. It was "crystal clear" to the trial court that the witness did not want to be there testifying and she never wanted to start the ball rolling on the

case because she loves Saiti, but that did not pressure her to testify differently than she did. RP 187-88.

Appellant states Lopez met with the prosecutor on a number of occasions.[1] Appellant's uncited reference is without support in the record. Appellant asserts the State sent officers to inform Lopez that she would be arrested if she did not cooperate, and asserts RP 139 supports this fact. Appellant mischaracterizes the record. The State attempted to call Lopez and feared she would not appear as directed. Further, officers were attempting to locate the firearm at issue in the case. Appellant further asserts, without citation to the record, that the State had interviewed Lopez on prior occasions.[2] The record demonstrates a material witness warrant issued when Lopez failed to appear at a deposition.[3] Appellant asserts Lopez was forced to give a deposition.[4] No deposition was given. Lopez participated in a joint interview with the defense and prosecution. RP 139. Appellant further misstates the record by misquoting the defense, asserting the State indicated it would charge perjury if Lopez would not testify as she had previously.[5]

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[1] Brief of Appellant at page 5
[2] Brief of Appellant at 6
[3] *Id.*
[4] *Id.*
[5] Brief of appellant at 7, quoting the defense argument, omitting "potentially" in the quoted materials.

## I. ARGUMENT

### 1. SUFFCIENCY OF THE EVIDENCE

Appellant asserts there is insufficient evidence Saiti knowingly possessed a firearm;[6] exerted unauthorized control over Lopez's vehicle; [7] used his position of trust, confidence, or fiduciary responsibility to facilitate the offense;[8] and that the offense involved an invasion of the victim's privacy.[9]

Saiti received a standard range sentence. As such, his assignments of error regarding the aggravating factors are moot. *State v. Beaver*, 184 Wn.App. 235, 241, 336 P.3d 654 (2014). The matter may be address if it presents a matter of continuing and substantial public interest. *Id.* In making such a determination courts consider (1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur. *Hart v. Dep't of Soc. & Health Servs.,* 111 Wn.2d 445, 448, 759 P.2d 1206 (1988). The State does not see this as an

[6] Brief of Appellant at 10
[7] Brief of Appellant at 11, 22
[8] Brief of Appellant at 24
[9] Brief of Appellant at 25

issue of public importance where an authoritative determination will assist, but will address the matter below.

### A. Standard of Review

Sufficient evidence supports the jury's verdict if a rational person viewing the evidence in the light most favorable to the State could find each element proven beyond a reasonable doubt. *State v. Montgomery*, 163 Wn.2d 577, 586, 183 P.3d 267 (2008). An appellant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences reasonably drawn from it. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable, and appellate courts defer to the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004).

### B. Sufficient Evidence Supported the Jury's Verdict Regarding Saiti's Unlawful Possession of a Firearm.

Saiti alleges the State failed to prove he knowingly possessed a firearm.[10] Unchallenged findings are verities on appeal.[11] *State*

[10] Brief of Appellant at 10-11

[11] Appellant availed himself of an *Old Chief* stipulation, agreeing to his prior felony conviction as a serious offense.

*v.Bonds*, 174 Wn.App. 553, 299 P.3d 663 (2013), RAP 10.3(g).

A felon may not lawfully possess a firearm. *See* RCW 9.41.040. Possession may be actual or constructive. *State v. Raleigh*, 157 Wn.App. 728, 737, 238 P.3d 1211 (2010). The State may establish constructive possession by showing the defendant had dominion and control over the firearm. *State v. Murphy*, 98 Wn.App. 42, 46, 988 P.2d 1018 (1999), *review denied*, 140 Wn.2d 1018, 5 P.3d 10 (2000). Mere proximity to the firearm is insufficient to show dominion and control. *Raleigh* 157 Wn.App. at 737, 238 P.3d 1211. "[T]he ability to reduce an object to actual possession" is an aspect of dominion and control, but "other aspects such as physical proximity" should be considered as well. *State v. Chouinard*, 169 Wn.App. 895, 282 P.3d 117 (2012), quoting *State v. Hagen*, 55 Wn.App. 494, 499, 781 P.2d 892 (1989). And knowledge of the presence of contraband, without more, is insufficient to show dominion and control to establish constructive possession. *State v. Hystad*, 36 Wn.App. 42, 49, 671 P.2d 793 (1983).

Courts have found sufficient evidence of constructive possession, and dominion and control, where the defendant was either the owner of the premises or the driver/owner of the vehicle

where contraband was found.[12] See *State v. Bowen*, 157 Wn.App. 821, 828, 239 P.3d 1114 (2010)(firearm located in nylon bag between the driver and passenger seats); *State v. Turner*, 103 Wn.App. 515, 521–24, 13 P.3d 234 (2000)(finding sufficient evidence where the rifle was inside a bow case that was lying partially open across the back seat behind the driver's seat); *State v. McFarland*, 73 Wn.App. 57, 70, 867 P.2d 660 (1994), *aff'd,* 127 Wn.2d 322, 899 P.2d 1251 (1995)(holding that there was sufficient evidence of constructive possession because the defendant knowingly transported the guns in his car); *State v. Echeverria*, 85 Wn.App. 777, 934 P.2d 1214 (1997)(finding sufficient evidence where the front of the gun, probably about three inches of the barrel, was sticking out from directly under the driver's seat and noting a rational trier of fact could find Mr. Echeverria possessed or controlled the gun that was within his reach).

Saiti and Lopez were together when she purchased the firearm and Saiti observed Lopez put the firearm in her purse. RP 76-77, 170. The purse Saiti took was the same purse Saiti had observed Lopez put the gun into. RP 77, 170-71. This was the only

[12] A vehicle is considered a "premises" for purposes of determining constructive possession. *State v. Turner*, 103 Wn.App. 515, 521, 13 P.3d 234 (2000).

place she ever kept her pistol. *Id.* This pistol that Saiti took was the same pistol Lopez kept in her purse and she owned no other firearms. RP 78, 81. Lopez's purse contained the keys to the vehicle and her pistol. RP 68, 114. The keys to Lopez's vehicle were located in the trailer where Saiti was apprehended. RP 212. Once officers were able to enter the vehicle they took a picture of Lopez's purse which was on the front passenger seat. RP 213-214. Clearly visible in the purse was an operable, loaded firearm. RP 216, 220. The cash which had been in the purse was missing. RP 217.

Lopez placed her vehicle keys in the open purse and when Saiti took the purse he would have had to reach into the purse to retrieve the keys. As a result he would have been in a position to know he was also taking a firearm. Further, when Saiti went into the purse to retrieve the $80.00 in cash from Lopez's wallet, he would have further observed the firearm and extra magazine. Saiti maintained the firearm in the front seat with him and he was the only occupant in the vehicle.

Admitting the truth of the State's evidence and all inferences reasonably drawn from it and viewing the evidence in the light most favorable to the State, as required, there is sufficient evidence to support the jury's verdict.

### C. Sufficient Evidence Supported the Jury's Verdict Regarding Saiti's Theft of a Motor Vehicle.

Saiti asserts there is insufficient evidence to establish the intent to deprive Lopez of her vehicle and, thus, the conviction for theft of a motor vehicle must be reversed.[13] As noted above, evidence is viewed in the light most favorable to the State and admits the truth of the State's evidence and all inferences reasonably drawn therefrom. Circumstantial and direct evidence are equally reliable, and appellate courts defer to the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence. *Thomas*, *supra* (citation omitted).

The credibility and veracity of witnesses are best determined by the fact finder. *In re Witt,* 96 Wn.2d 56, 633 P.2d 880 (1981). "Intent" to commit a criminal act means more than merely "knowledge" that a consequence will result. *State v. Caliguri*, 99 Wn.2d 501, 505, 664 P.2d 466 (1983). "Intent" exists only if a known or expected result is also the actor's "objective or purpose." *Caliguri*, 99 Wn.2d at 506 (citing RCW 9A.08.010(1)(a)). Where there is no direct evidence of the actor's intended objective or purpose, intent may be inferred from circumstantial evidence. *Id.* (citing *State v.*

[13] Brief of Appellant at 23-24

*Shelton*, 71 Wn.2d 838, 839, 431 P.2d 201 (1967)). A jury may infer criminal intent from a defendant's conduct where it is plainly indicated as a matter of logical probability. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997) (citing *State v. Bright*, 129 Wn.2d 257, 270, 916 P.2d 922 (1996)). This includes inferring or permissively presuming that a defendant intends the natural and probable consequences of his or her acts. *Caliguri*, 99 Wn.2d at 506 (citing *State v. Caldwell*, 94 Wash.2d 614, 617–18, 618 P.2d 508 (1980)).

Here, the natural and probable consequences of Saiti's actions were to deprive Lopez of her vehicle and money in order to obtain heroin.

December 20, 2015, Saiti and Lopez argued over money; money Saiti wanted to obtain heroin. RP 53, 63, 171. Saiti persisted, going to Lopez's restaurant several times requesting money, use of the vehicle, and her phone, all of which Lopez declined to provide. RP 65, 66, 109. Lopez's co-worker, Leback, observed Saiti leaving the restaurant very fast holding Lopez's purse. RP 110, 112. Lopez, frantic, upset, shaky, and on the verge of tears, told her co-worker Saiti "stole my purse and my car" and asked her to call the police. RP 66, 68, 69, 112, 114. Lopez testified that she did not give anyone, including Saiti, permission to take her vehicle on December 20, 2015.

RP 74, 161, 176. Lopez was angry that Saiti had taken her car, and was clear that her car had been stolen and not merely borrowed. RP 244.

Admitting the truth of the State's evidence and all inferences reasonably drawn from it, and viewing the evidence in the light most favorable to the State, as required, there is sufficient evidence to support the jury's verdict.

### D. Sufficient Evidence Supported the Jury's Verdict Saiti Used His Position of Trust.

Saiti argues without providing authority[14] that there is insufficient evidence to establish he used his position of trust or confidence to commit the offense of theft of a motor vehicle.

A challenge as to the sufficiency of an aggravating factor is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements beyond a reasonable doubt. *State v. Hyder*, 159 Wn.App. 234, 259, 244 P.3d 454 (2011), citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

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[14] An appellate court need not consider arguments that are not developed in the briefs and for which a party has not cited authority. *Bercier v. Kiga*, 127 Wn.App. 809, 103 P.3d 232 (2004)

The position of trust aggravating factor requires that the defendant used his position of trust to facilitate the crime. RCW 9.94A.535(3)(iv); *Hyder*, 159 Wn.App at 262.

Saiti entered an area of the restaurant and went into an employee-only area of the restaurant to take Lopez's purse. RP 64, 69. It was the relationship between Saiti and Lopez that made this possible. In fact, Leback recognized Saiti as Lopez's boyfriend, as he had been in the restaurant nearly weekly for several months. RP 109. On this day in particular, it was Saiti's position of trust which allowed Saiti into the location where he was able to commit this offense. Saiti was permitted to work matters out with Lopez in the employee-only area while the manager, Leback, returned to her office. RP 109-110.

### E. Sufficient Evidence Supported the Jury's Verdict Saiti Invaded Lopez's Privacy.

As noted above, a challenge as to the sufficiency of an aggravating factor is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Hyder*, supra (citation omitted).

Lopez, who normally would not take her purse to work with her, maintained her purse and vehicle keys in an employee-only area of her work. RP 64, 69. She did so that day to keep these items away from Saiti who she feared would take them and purchase heroin. Moreover, Lopez would not even give him money that was in her purse, nor would she allow him to use her car or phone. *Id.* It was evident Lopez intended to keep these items private and away from Saiti. Thus, in light of all evidence viewed in the light most favorable to the prosecution a rational juror could have found the essential elements beyond a reasonable doubt and the verdict should not be disturbed.

## 2. CONFRONTATION CLAUSE

### A. Standard of Review

A trial court's evidentiary rulings limiting the scope of cross-examination are reviewed for manifest abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985). Both the federal and state constitutions guarantee a criminal defendant the right to confrontation, including the right to conduct a meaningful cross-examination of adverse witnesses. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). But the right to cross-examine adverse witnesses is not absolute, and "[t]he

confrontation right and associated cross-examination are limited by general considerations of relevance." *Darden*, 145 Wn.2d at 620–21 (citing ER 401, ER 403).

Violations of the confrontation clause are subject to harmless error analysis. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005), *aff'd by Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). When determining whether a constitutional error is harmless, courts apply the overwhelming untainted evidence test. *Davis*, 154 Wn.2d at 305. "Under that test, where the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless." *Davis*, 154 Wn.2d at 305 (citing *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002)).

### B. The Trial Court Properly Excluded Testimony Regarding Material Witness Warrant.

Saiti asserts the trial court's denial of his cross-examination of Lopez related to the issuance of a material witness warrant denied him the ability to test the witness' reliability, possible bias, motivation, and credibility.[15] RP 188. Saiti makes additional factual statements which suggest Lopez's prior statement under penalty of perjury

[15] Appellate brief page 26-41

raised doubt as to its trustworthiness[16] and that she was pressured to testify in a particular way, thus giving rise to cross-examination on those issues; however, that was not what the Defense requested at trial.[17] A party who objects to the admission of evidence on one ground at trial may not assert a different ground for excluding that evidence on appeal. *State v. Price*, 126 Wn.App. 617, 637, 109 P.3d 27 (2005).

Extrinsic evidence of collateral matters may not be offered to impeach a witness. *State v. Fisher*, 165 Wn.2d 727, 750–51, 202 P.3d 937 (2009); *State v. Carlson*, 61 Wn.App. 865, 876, 812 P.2d 536 (1991)(extrinsic evidence cannot be used to impeach a witness on collateral issues, even if the evidence may have some indirect bearing on motive, bias, or prejudice). Evidence pertains to a collateral matter if it is inadmissible for any reason other than to

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[16] Saiti asserts, without reference to the record, Lopez is uncomfortable with the English language; that Lopez met with the prosecutor on several occasions; that law enforcement asserted she would be arrested if she refused to cooperate; that she was forced to testify and that a deposition was taken; and that she was committing perjury. Brief of Appellant at 28-30. These assertions are unsupported by the record. It is evident Lopez was interviewed by the State and Defense and that she made a sworn statement. Lopez was not deposed. While Lopez indicated concern about her writing, she was also under the stress of the event. That, alone, does not translate into an issue with her ability to sufficiently communicate in English. There is nothing in the record that indicates Lopez met on several occasions with the prosecutor. In fact, the record demonstrates the State had issue contacting Lopez and sent an officer to request contact and to obtain the firearm that was stolen.

[17] Brief of Appellant at 31, RP 189 (Defense asked "that [its motion] be rephrased as defense motion to allow in evidence regarding material witness warrant."); see also RAP 2.5.

contradict a witness. *State v. Descoteaux,* 94 Wn.2d 31, 37–38, 614 P.2d 179 (1980), *overruled on other grounds by State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982). An issue is collateral if it is not admissible independently of the impeachment purpose. *Descoteaux*, 94 Wn.2d at 37–38. Put another way, a witness may be impeached on only those facts directly admissible as relevant to the trial issue. See also ER 401 (relevant evidence is evidence tending to make any fact of consequence more probable or less probable); *State v. Oswalt*, 62 Wn.2d 118, 121–22, 381 P.2d 617 (1963); *State v. Fairfax*, 42 Wn.2d 777, 780, 258 P.2d 1212 (1953). The trial court has discretion to reject cross-examination where the circumstances remotely tend to show bias or prejudice, where the evidence is vague, or where the evidence is merely argumentative and speculative. *State v. Roberts*, 25 Wn.App. 830, 834, 611 P.2d 1297 (1980) (citing *State v. Jones*, 61 Wn.2d 506, 512, 408 P.2d 247 (1965). A criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983), citing *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

In this case Lopez's direct testimony appeared inconsistent with prior testimony. As such, the State began to elicit testimony of

Lopez's prior statement pursuant to ER 613. RP 51-53. When Lopez indicated she and Saiti had not been in an argument the morning of the incident, the State requested argument outside of the presence of the jury. RP 53. It was under this circumstance that Saiti sought to introduce the arrest on the material witness warrant.

Because the circumstance of the material witness warrant was ancillary to the substantive issue of whether she gave Saiti permission to use the vehicle, any testimony related to the material witness warrant was properly excluded.

Next, citing *State v. Gefeller*, 76 Wn.2d 449, 458 P.2d 17 (1969), Saiti asserts the trial court explaining perjury, a word she did not understand, opened the door to admitting the material witness warrant, and the discussion the Court had with Lopez.[18] *Gefeller* involved testimony regarding a lie detector test which was first elicited by the defendant and, as such, opened the door to the State's questions related thereto. Without developing the argument, Saiti asserts this fact "clearly" impacts the witness' credibility.[19] Every witness is required to be administered an oath. ER 603. Implicit in this is that they understand their oath. *State v. Dixon*, 37 Wn.App.

[18] Brief of Appellant at 33
[19] Brief of Appellant at 34

867, 684 P.2d 725 (1984). Admitting testimony regarding Lopez understanding her obligation is not at the heart of whether Saiti unlawfully took her vehicle.

The trial court confirmed the witness understood her obligation to tell the truth, as she did not know the definition of perjury, and confirmed for the witness that "all the Court expects from you to do is to follow your oath that you would tell the truth." RP 59. Additionally, the trial court told Lopez, "the court is not telling you to testify in any certain way except expects you to tell the truth" and that the court "is not telling you to agree with what the prosecutor might want you to say." RP 60. The Court further made it clear that Lopez need not worry about the prosecutor or the defense, that "what counts is that you tell the truth the best that you know the truth..." PR 62. While the defense asserted, "reading between the lines," the trial court was, in short, telling the witness that if she did not testify in a particular way, she would potentially be charged with perjury. RP 58. The trial court confirmed that was not what had occurred. *Id.*

The trial court properly excluded testimony regarding the previously issued material witness warrant as ancillary to any issue of fact, and the trial court's further exclusion of testimony related to Lopez's understanding of her obligation to tell the truth was, likewise,

properly excluded. In the event it was improperly excluded, the failure to allow such testimony was harmless as there was overwhelming evidence that Saiti did not have permission to take Lopez's vehicle as evidenced by her immediate reaction and statement to her co-worker that Saiti had just stolen her purse and vehicle. RP 110, 112.

### 3. OUT OF STATE CONVICTION

Saiti stipulated to certain out of state convictions. CP 108. Saiti now asserts his California conviction for attempted grand theft should not have been included in his offender score as a Washington equivalent felony offense.[20]

#### A. Standard of Review

The classification of an out-of-state conviction is reviewed *de novo*. *State v. Labarbera*, 128 Wn.App. 343, 115 P.3d 1038 (2005).

#### B. Grand Theft is Comparable to Second Degree Theft

Saiti complains his California Attempted Grand Theft conviction was incorrectly included in his offender score.

RCW 9.94A.525(3) provides out-of-state convictions for

[20] Brief of Appellant at 41-42.

offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. RCW 9.94A.525(4) provides prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) are to be scored the same as if they were convictions for completed offenses.

Saiti's conviction for Attempted Grand Theft began as three felony counts of attempted first degree robbery as noted on the Abstract of Judgment in CP 110 as F (001) PC 666/211/212.5; F (002) PC 664/211/212.5; (f) (003) PC 664/211/212.5. "F" indicates the offense is a felony; PC represents Penal Code; section 664 is California's attempt statute; 211 is California's Robbery statute; and 212.5 indicates either the victims were persons performing their official duties, or the offense was second degree robbery. The Abstract of Judgment indicates these offenses were committed against Jonathan Herrera, Kimberly and Jonathan Brauel. CP 110. Therefore, as charged, this was three counts of second degree robbery. The Abstract of Judgment reflects a fourth offense was added, PC 664/487(c), California Penal Code for attempted Grand Theft, which Saiti pled *Nolo Contendere* to that offense and the original offenses were dismissed. CP 111, 112. As a result of the

conviction, Saiti was ordered not to own or possess a firearm, sentenced to three years of probation, and six months in custody. CP 112.

Saiti's conviction is Washington's equivalent to second degree theft.

To determine if a foreign crime may be included in calculating an offender score, courts compare the foreign crime's elements to the Washington criminal statutes in effect at the time the defendant committed the foreign crime. *State v. Morley*, 134 Wn.2d 588, 605, 952 P.2d 167 (1998). If the foreign conviction is comparable to a Washington crime, the sentencing court may count it toward the offender score as if it were the equivalent Washington offense. *Morley*, 134 Wn.2d at 606. If the elements are not identical, then the sentencing court may look at the defendant's conduct, as evidenced by the indictment or information, to determine whether the conduct would have violated the comparable Washington statute. *Id.* If the Washington statute defines the offense with elements that are identical to, or broader than, the foreign statute, then the conviction under the foreign statute is necessarily comparable to a Washington offense. *State v. Collins*, 144 Wn.App. 547, 553, 182 P.3d 1016 (2008). But if the Washington statute defines the offense more

narrowly than the foreign statute, then the court must determine whether the defendant's conduct, as evidenced in the records of the foreign conviction, would have violated the Washington statute. *Collins*, 144 Wn.App. at 554.

California's Grand Theft statute is comparable to Washington's Second Degree Theft. While California law provided that a person committed theft by feloniously taking, Washington's "wrongfully obtain" is the substantial equivalent. In addition, California courts have held that theft "requires a specific intent permanently to deprive the rightful owner of his property." *California v. Kunkin*, 9 Cal.3d 245, 251, 507 P.2d 1392, 107 Cal.Rptr. 184 (1973). Accordingly, California's definition of theft is essentially identical to Washington's definition of theft. In addition, because California required the stolen property to be worth at least $400, an amount that is higher than the former $250 Washington requirement, a person would have necessarily violated the Washington statute by violating the California statute. Accordingly, California's grand theft statute, former Cal.Penal Code § 487(a), was legally comparable to Washington's second degree theft statute, former RCW 9A.56.040. See unpublished case[21] of *State v. Tauscher*, 175 Wn.App. 1019

[21] The citation to the unpublished materials is offered pursuant to GR 14.1.

(2013)(California Grand Theft is Washington's Second Degree Theft equivalent); *State v. Hargrave*, 133 Wn.App. 1019 (2006)(California Grand Theft comparable to Washington's Second Degree Theft).

Saiti's offender score was properly calculated. However, assuming, arguendo, that it was not, the sentence imposed is within the standard range for the next lowest range and thus the sentence need not be disturbed on appeal. *State v. Tili*, 148 Wn.2d 350, 60 P.3d 1192 (2003)(remand for recalculation of offender score is unnecessary). The trial court did not impose an exceptional sentence despite the jury's finding, but also declined to impose a sentence below the standard range. Consequently, even if the offender score was miscalculated by including Saiti's California conviction for Attempted Grand Theft, resentencing is not required as the sentence imposed is within the next lower standard range.

**4. GENERAL-SPECIFIC DOCTRINE**

Saiti asserts his conviction for unlawful possession of heroin and unlawful use of drug paraphernalia are "concurrent and the court should dismiss the possession of a controlled substance charge."[22] Saiti appears to argue a general-specific statute violation asserting

[22] Brief of Appellant at 50

*State v. Williams*, 62 Wn.App. 748, 815 P.2d 825 (1991) controls. In *Williams* the trial court dismissed the felony possession offense reasoning the residue in the pipe must be charged as the more specific drug paraphernalia statute. The appellate court disagreed, holding the two statutes are not concurrent as a defendant may violate the paraphernalia statute although his conduct does not violate the statute prohibiting possession of controlled substances. Saiti urges a different result yet fails to demonstrate an alternative test.

### A. Standard of Review

Whether two statutes are concurrent is reviewed *de novo*. *State v. Wilson*, 158 Wn.App. 305, 314, 242 P.3d 19 (2010).

### B. Possession of a Controlled Substance and Use of Paraphernalia Are Not Concurrent Statutes

If a person can violate the specific statute without violating the general statute, the statutes are not concurrent. *State v. Heffner*, 126 Wn.App. 803, 808, 110 P.3d 219 (2005). Statutes are only concurrent when every violation of the specific statute would result in a violation of the general statute. *State v. Chase*, 134 Wn.App. 792, 800, 142 P.3d 630 (2006). Statutes are concurrent if all of the elements to convict under the general statute are also elements that

must be proved for conviction under the specific statute. *State v. Presba*, 1131 Wn.App.47, 52, 126 P.3d 1280 (2005). Whether statutes are concurrent involves examination of the elements of the statutes, not the facts of the particular case. *Chase*, 134 Wn.App. at 802–03.

The elements of use of drug paraphernalia, pursuant to RCW 69.50.412(1), are:

> It is unlawful for any person to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance other than marijuana.

In a given case, it is conceivable that the facts may support a charge for use of paraphernalia, even though there is no evidence of controlled substance possession. Possession of controlled substances, though implied through use of paraphernalia, is not an element of RCW 69.50.4013 which provides:

> It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

Because the elements of the statutes differ, and not every violation of one is a violation of the other, the general-specific analysis does not apply.

Saiti urges dismissal of the possession offense. It appears, perhaps, he is blending a double jeopardy argument with the general-specific doctrine in making this request. The general-specific doctrine is inapplicable from the double jeopardy doctrine. *State v. Albarran*, 187 Wn.2d 15, 383 P.3d 1037 (2016). Were it to apply, however, the remedy for a violation of double jeopardy protections is to vacate the "lesser" offense—meaning either the offense that forms part of the proof of the other (greater) offense or the offense that triggers the lesser sentence. *Id.* citing *State v. Weber*, 159 Wn.2d 252, 266–69, 149 P.3d 646 (2006). The rationale for this remedy is the presumption that the legislature does not intend a defendant to benefit (get a lighter sentence) from committing more crimes. *Webber* 159 Wn.2d at 267.

The convictions for unlawful possession of heroin and use of paraphernalia should not be disturbed on appeal.

## V. CONCLUSION

Based on the foregoing there was sufficient evidence to support the jury's verdicts for unlawful possession of a firearm and theft of a motor vehicle, as well as the aggravating circumstances. The trial court properly excluded evidence related to the issuance of a material witness warrant and there was no Constitutional violation. The trial court properly included Saiti's conviction for Grand Theft as equivalent to Washington's Second Degree Theft. Finally, Saiti's general-specific argument is misplaced. Consequently, the verdicts and the sentence should be affirmed.

RESPECTFULLY submitted this 18th day of February, 2017.

MARK MCCLAIN, WSBA 30909
Pacific County Prosecutor
Attorney for the Respondent.

**PACIFIC COUNTY PROSECUTOR**

**February 22, 2017 - 9:19 AM**

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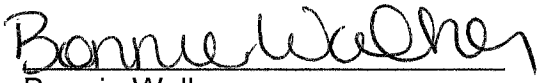
Signed this 22nd day of February, 2017, at South Bend, Washington.



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